LIBRARY
SUPREME COURT, U. S.

S... U. S.
... 5 1972
... CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1448

ENSO-GUTZEIT, O/Y, FINN LINES, LTD. O/Y and CONNECTICUT TERMINAL CO., INC.,

Petitioners,

—against—

ROBERT SIDEREWICZ,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FRANCIS X. BYRN
One States Street Plaza
New York, N. Y. 10004
Counsel for Petitioners
Enso-Gutzeit O/Y and
Finn Lines, Ltd. O/Y

JOHN J. COTTER, Esq.
1167 Park Avenue
Bridgeport, Connecticut 06604
Counsel for Petitioner
Connecticut Terminal Co., Inc.

HAIGHT, GARDNER,
POOR & HAVENS
Of Counsel to Petitioners
Enso-Gutzeit O/Y and
Finn Lines, Ltd. O/Y

COTTER, COTTER & SOHON
Of Counsel to Petitioner
Connecticut Terminal Co., Inc.

INDEX

Page

Opinions Below 1

Jurisdiction 2

Questions Presented for Review 2

Statement of the Case 4

(a) The Facts 4

(b) Basis for Federal Jurisdiction 11

Reasons for Granting the Writ 11

A. The addition of a ninth bale on an isolated occasion doth not a "method" make 13

B. The irrelevance of what was discharged from the hooks prior to their return to the vessel 14

C. It was not inevitable or even foreseeable that in returning the hooks to the vessel, the longshoremen would drag them along the surface of the deck 16

D. The Court of Appeals opinion conflicts with this Court's decision in Caputo v. Tuckahoe Overseas Corporation, 400 U.S. 414 18

E. The Court of Appeals decision conflicts with this Court's summary action in Zim Israel Navigation Co. v. Tarabocchia, 401 U.S. 930 and with the consequent disposition by another panel of the same Court of Appeals, 446 F.2d 1375 20

PAGE

F. The holding of the Court of Appeals below is determinative of uniformity of decision in maritime law 19

Conclusion 20

Appendix 1a

Cases Cited

Candiano v. Moore McCormack Lines, Inc. v. John W. McGrath Corporation, 382 F.2d 961 (2 Cir. 1967) 21
Candiano v. Moore McCormack Lines, Inc. v. John W. McGrath Corporation, 386 F.2d 444, 446 (2 Cir. 1967) 23

Mitchell v. Trawler Racer, 362 U.S. 539, 550 (1960) .. 24
Moragne v. States Marine Lines, 398 U.S. 375 (1970) ..4, 23

Pacific Coast Shipping Co. v. Ryan, —— U.S. ——, #71-602 (40 L.W. 3335) January 18, 1972 .....3, 13, 15, 23, 24

Penero v. Rederi A/B Disa, 422 F.2d 302 (2 Cir. 1970) 4

Radovich v. Cunard Steamship Co., Ltd., 366 F.2d 140, 141 (2 Cir. 1966) 22, 23
Wilson v. U. S., 429 F.2d 307, 309 (2 Cir. 1970) 10
Wynn v. Pacific Coast Shipping Co., 448 F.2d 325 (9 Cir. 1971) 18

Skibinski v. Waterman Steamship Corp., 360 F.2d 539, 543 (2 Cir. 1966) 23

Tarabocchia v. Zim Israel Navigation Co., 297 F. Supp. 378, 380 (S.D.N.Y. 1969) 20, 21

Page

Farrabocchia v. Zim Israel Navigation Co., Ltd., 417 F.2d 416, 417 (2 Cir. 1969) 2, 12, 13, 23, 25

Farrabocchia v. Zim Israel Navigation Co., 440 F.2d 1073 (2 Cir. 1971) 4, 20, 21, 22

Farrabocchia v. Zim Israel Navigation Co., ___ U.S. ___, 91 S.Ct. 760 (March 22, 1971) 13, 20

Theodoridis, etc. v. Hercules Navigation Co., Inc., 442 F.2d 701, 704 (5 Cir. 1971) 14

Usner v. Luckenbach Overseas Corp., 397 U.S. 933 (1970) 9

Usner v. Luckenbach Overseas Corp., 400 U.S. 494 (1971) 2, 3, 5, 11, 18, 19, 20, 21, 24

Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971) 2, 24

Zim Israel Navigation Co., Ltd. v. Tarabocchia, 401 U.S. 939 (1971) 3, 11, 13, 20, 23, 24

STATUTES AND OTHER AUTHORITIES CITED

46 U.S.C. 1254(d) 4
46 U.S.C. 1300(a) 4
46 U.S.C. 1302 11
46 U.S.C. 1304 11
29 CFR 1504.81(c) 14
Vol. III Webster's New International Dictionary, Second Edition, 1959 13

INDEX TO APPENDIX

PAGE

Opinion of the Court of Appeals 1a

Judgment of the Court of Appeals 7a

Order Denying Rehearing by Court of Appeals 9a

Order Denying Rehearing in Banc by Court of Appeals 10a

Post Trial Colloquy in the District Court 11a

Judgment Appealed from United States District Court 20a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

ENSO-GUTZEIT, O/Y, FINN LINES, LTD. O/Y and CONNECTICUT TERMINAL CO., INC.,

Petitioners,

—against—

ROBERT SIDEREWICZ,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above case.

Opinions Below

The opinion of the Court of Appeals is reported at 453 F.2d 1094. The decision of the District Court[1] dismissing plaintiff's complaint is unreported but it appears during the post-trial colloquy in the transcript pp. 110 to 122.[2]

---

[1] Circuit Judge J. Edward Lumbard of the United States Court of Appeals for the Second Circuit sitting by designation.

[2] This has been certified by the Clerk of the Court of Appeals and filed in this Court. Reference to the transcript will be to "Tr."

Both the opinion and the post trial colloquy are reprinted in the appendix[3] hereto, pages 1a and 11a.

Jurisdiction

The judgment of the Court of Appeals reversing the District Court was entered on January 4, 1972 (p. 7a). The orders of the Court of Appeals denying rehearing and rehearing in banc were entered on February 8, 1972 (pp. 9-10a).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. Section 2101(c).

Questions Presented for Review[4]

1. Where there was no question at trial as to the sound condition of the vessel's winches and appurtenant gear and no involvement of ship's personnel in the discharging operation, was not the District Court correct in ruling as a matter of law under *Usner* v. *Luckenbach Overseas Corp.*, 400 U.S. 494 (1971) that plaintiff longshoreman's shoreside accident was caused by an isolated negligent act of one or more of plaintiff's fellow employees, who, after discharging a draft of bales of wood pulp, returned the discharging gear, consisting of a set of bale hooks, in such a way as to

---

[3] Appendix pages are identified by "a."

[4] The Court of Appeals left open (p. 6a Footnote 7) the question of whether the shipowner warranted the seaworthiness of the pier itself. In the opinion of petitioners this is not an open question and will not be discussed here, see *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202 (1971), *Penoro* v. *Rederi A/B Disa*, 422 F.2d 392 (2 Cir. 1970) and *Tarabocchia* v. *Zim Israel Navigation Co., Ltd.*, 417 F.2d 476, 477 (2 Cir. 1969).

fail to clear the pier and instead caused the hooks to be dragged or swung at or near the pier surface, resulting in one hook snagging the caplog, breaking loose and striking plaintiff?

(a) Was the Court of Appeals therefore in error under *Usner* in reversing the District Court to permit a jury on retrial to determine the vessel was unseaworthy under such circumstances?

2. Where the uncontroverted evidence was that all nine bales were safely separated on the pier from the discharging gear and the accident occurred on the return of the empty slings to the vessel, may a jury on retrial, still be permitted to determine, as the Court of Appeals said it might, that the addition of a ninth bale to a customary eight bale draft on an isolated occasion, may constitute an unsafe method of discharge and therefore an unseaworthy "condition" "resulting" in plaintiff's injuries, within the meaning of this Court's decision in *Usner supra* p. 498, 500?

Or in other words could nine bales on one occasion be deemed a "method", could it be termed "unsafe" when nothing happened until after they were gone, and how in the name of sound reasoning could a nine bale draft have had anything to do with plaintiff's later accident?

3. Does not the decision of the Court of Appeals therefore conflict not only with that of this Court in *Usner, supra,* where summary judgment in favor of the shipowner was upheld, but also with this Court's summary decisions in *Zim Israel Navigation Co., Ltd.* v. *Tarabocchia,* 401 U.S. 930 and *Pacific Coast Shipping Co.* v. *Ryan,* —— U.S. —— #71-602 (40 L.W. 3335, January 18, 1972) if not indeed

with the Court of Appeals' own decision on remand from this Court in *Tarabocchia* v. *Zim Israel Navigation Co.*, 446 F.2d 1375.

(a) If so, does not the Court of Appeals disposition also violate the uniformity of maritime decision principle stressed by this Court in opinions such as *Moragne* v. *States Marine Lines*, 398 U.S. 375.

Statement of the Case

(a) The Facts

There is no significant dispute as to the underlying facts. Plaintiff, a longshoreman employee of petitioner Connecticut Terminal Co., Inc., hereinafter called the stevedore, was injured on the State Pier, New London, Connecticut while engaged in the discharge of bales of wood pulp from the m/s FINNEAGLE, a Finnish flag vessel, whose registered and managing owners were respectively, petitioners, Enso-Gutzeit O/Y and Finn Lines, Ltd. O/Y, jointly referred to hereinafter as the shipowner.

As the Court of Appeals stated in its opinion (pp. 2-3a):

> "Stationed on the pier, he was hurt when one of the hooks, after being freed of bales in the unloading process, snagged on a part of the pier as the empty sling to which it was attached was being returned to the vessel."

Plaintiff sued the shipowner for unseaworthiness and the shipowner impleaded the stevedore. At the end of plaintiff's liability evidence,[3] the District Court dismissed the action under the authority of this Court's decision in

Usner v. *Luckenbach Overseas Corporation, et al.*, 400 U.S. 494 (1971), stating (p. 16a) "The decision is so square, the principle is clear and the facts similar," and that "the Supreme Court has clearly indicated the position which we must take in this situation." It found it unnecessary (p. 17a) to determine which or how many of plaintiff's fellow longshoremen were at fault,

> "It might in part be that of the plaintiff although it seems more likely that it was the signalman who supposedly was watching what happened and, perhaps, should have given the signal somewhat sooner but, in any event, whose ever fault it might be and to what degree, the one thing that seems clear is that it is not the condition under this Supreme Court case which permits the jury to find that the ship was unseaworthy."

The Court of Appeals reversed holding that the addition of a ninth bale "tied by rope (without hooks)" (p. 4a) to the discharging draft on this one occasion could have constituted an improper method of discharge since the hooks on the other eight then had to be lowered to the surface of the pier and, following the removal of the bales from the hooks, the dragging or swinging[5] of the hooks along the surface of the pier by plaintiff's fellow longshoremen could be a proximate cause of plaintiff's accident arising out of the prior improper method of discharge.

---

[5] Incorrectly stated by the Court of Appeals to be (p. 3a) "At the close of all the evidence."

[6] See Bartnicki Tr. 41.

Four witnesses including plaintiff testified at the trial. The other three were all called by plaintiff and were all indisputably fellow employees of plaintiff. There was no evidence whatsoever of any participation by ship's officers or crew in the discharging operation. Indeed the Court of Appeals noted in its footnote 1 (p. 2a) that the claim of negligence was dismissed by consent.

As with the *Usner* case there was nothing wrong with the winches, cargo runners, hooks, other appurtenances or cargo during some seven hours before the accident. (Siderewicz Tr. 88-89). The winchman agreed it was a "smooth operation" (Murphy Tr. 108). The four longshoremen who testified were men of considerable experience at their particular jobs. Plaintiff (18 years at time of trial Tr. 98) and Bartnicki (since 1958; Tr. 3) were the two men on the pier unhooking the drafts. Sweeney, the signalman at the ship's rail, who acted as liaison between the men on the pier and the winchman had 25 years (Tr. 48) and the winchman, Murphy 18 years (Tr. 98).

The entire operation, from the moment of the forming of the drafts in the lower hold, during their conveyance to the pier and detachment from the hooks, to the return of the slings to the vessel, was under the control of employees of the stevedore (Bartnicki Tr. 24-26). The longshoremen who testified fully acknowledged their responsibilities. Bartnicki testified as follows (Tr. 15):

> "We untangle the hooks, take the hooks out and one man will take them and send them back up again."

(Tr. 19):

> Q. Now, what did the four men do when they released the eight hooks? A. One man holds them to let them go up.

Q. Was that done that day? A. It was.

Q. Do you remember who the man was? A. The man that got hit with the hook.

* * * * *

(Tr. 21):

Q. Who gives the signals? A. The man holding the hooks.

Further (Tr. 26):

Q. I believe you testified that it was Mr. Siderewicz who gathered the hooks together. A. Siderewicz.

* * * * *

Q. Is it his job to see that the hooks are off the pier? A. That's right. Well, at that time anyway.

Sweeney (signalman) (Tr. 52-53)

Q. Were you looking at the dock, Mr. Sweeney, when the signal was given that the hooks were clear? A. Oh, yes.

Q. Who gave that signal? A. Mr. Siderewicz.

Q. Did you yourself see that the hooks were clear or did you rely on someone else. A. I saw that the hooks were clear to my satisfaction and with his signal and I gave the signal to go.

Plaintiff (Tr. 66), .

"I was on the end and it was my job to take the ropes and pull them together and all the hooks will come into a little pile, I nodded to Mr. Sweeney, the signalman, that they were clear. I stepped back about 5 feet

and the hooks proceeded to go up and all of the sudden one caught on the under part of the edge and this was the rope we used as nylon and it ripped like a sling shot and nobody could see it coming but I was the one that got it.

Plaintiff testified that there were only drafts of eight bales prior to the accident (Tr. 86). He apparently returned the hooks in the same manner irrespective of the number of bales previously detached. Thus, he said (Tr. 81):

> Q. Was it your practice on each occasion to gather the hooks together before they went out. A. In the position I was working, yes.
>
> * * * * *
>
> Q. On the load that came over, before this one, who sent the hooks back? A. I did.
>
> Q. And you gathered them in your arms? A. I take and pull them together and step back out of the way.
>
> Q. And then you tell Sweeney? A. I nod to him.

He was asked (Tr. 90):

> Q. Are there occasions when hooks get on the dock? A. I would say yes.
>
> Q. So that the hooks get on the dock even when there are eight or nine and you gather them together and then tell the signalman to go ahead up. A. To go up.

Taking plaintiff's optimum version[7] of the cause of the accident as we must following a dismissal at the end of

---

[7] The Court of Appeals acknowledged there were conflicting accounts from these same men. Conflicting accounts do not of course

his evidence, we find him emphasizing, post *Usner*, what was earlier a secondary theory, that the addition of a ninth bale made it necessary to lower the draft closer to the pier so that the hooks after being freed would be on the surface of the dock, or two to three feet lower than with eight bales, "with the likely result that the hooks would drag on or near the floor after unloading and more easily tend to get snagged on the planks or on the caplog at the edge of the dock" (p. 4a).

Accepting all of the foregoing as plaintiff's most favorable, or at least preferred, version, there is still no reason to depart from the District Court's conclusion that the accident resulted from an isolated act of negligence on the part of one or more of plaintiff's fellow employees.[8] The

---

mandate a jury disposition when all accounts add up to the same conclusion. Thus, after certiorari was granted in *Usner*, 397 U.S. 933 on February 27, 1970, plaintiff resourcefully moved for summary judgment stressing the then still viable theory in the Second Circuit that an act of operating negligence of a fellow longshoreman would be productive of an unseaworthiness judgment against the shipowner. An affidavit (Exhibit A below Tr. 42-45) prepared for signature by four longshoremen including three who testified, tended to blame one of their number, the winchman, as plaintiff's principal theory of unseaworthiness (Tr. 43),

> "The winchman, instead of waiting for somebody to release the hook and without anyone signalling him to take up on the line, proceeded to strain the line until the hook came away carrying a piece of the wooden caplog with it and swung North about six feet to where the plaintiff was standing."

At trial on May 17, 1971 or after this Court's decision in *Usner* on January 25, 1971, all three repudiated their affidavit to this effect (Bartnicki, Tr. 29, Sweeney, Tr. 54 and Murphy, Tr. 101). Then again a certain amount of scrambling to accommodate to a new decision is probably to be expected.

[8] Contrary to the opinion below (p. 5a), there is nothing in the post-trial colloquy which indicates that the Trial Court based its holding on the fact that plaintiff was holding the hooks up off the dock so that they were not dragging, although there was some evidence to this effect.

District Court specifically said (p. 17a) it was not necessary to say which longshoreman's act of negligence caused the accident.

Based on their admitted actions and responsibilities, it is inescapable that the hook became snagged as a result of something that plaintiff, Sweeney, the signalman, or Murphy the winchman, or any combination thereof, did or did not do. Assuming again the view of the facts as expressed by the Court of Appeals that the hooks were still dragging on the pier, the District Court's conclusions should have remained undisturbed. Hooks, like winches do not become bewitched[9] and do not raise, lower, drag or swing themselves. They were moved by the concerted actions of the winchman actuating the ship's hoisting and lowering mechanism, the signalman who told the winchman when to raise and lower them, and by plaintiff himself on the pier who gathered the slings or hooks together and advised the signalman when they were free to go up. With the winches operating properly (Murphy, Tr. 108), and with the drafts, according to plaintiff, having come straight down (Tr. 90), the hooks should also have gone straight back up. There is no explanation for the hooks being dragged along, or swung just above, the surface of the pier other than a breakdown of coordination between plaintiff, the signalman and the winchman, in any possible combination—precisely what the District Court held.

That the longshoremen were not supposed to drag the hooks on the pier is evident from the concessions of plaintiff and Sweeney that it was their responsibility to see to it that they were clear. The winchman only stated the

---

[9] *Russo* v. *U. S.*, 228 F.2d 317, 318 (2 Cir. 1955).

obvious when he answered a leading question by plaintiff's counsel (Tr. 109):

> *Q. When hooks drag along the dock, is that a competent producing cause of the hooks catching? A. Yes, it is.*

The longshoremen most certainly did not intend to drag the hooks. They believed them to be clear. That they were not is indicative only of their miscalculation, not of the vessel's unseaworthiness. What happened here then is no more nor less than what happened in *Usner, supra,* p. 495, where the sling was lowered "too far and too fast." Here the slings were simply kept "too low for too long" with too much horizontal and not enough vertical direction.

(b) Basis for Federal Jurisdiction

District Court jurisdiction was based upon 28 U.S.C. 1332. Appellate jurisdiction, in the United States Court of Appeals for the Second Circuit was based upon 28 U.S.C. 1291.

Reasons for Granting the Writ

It is respectfully submitted that the decision of the Court of Appeals herein reversing the District Court which dismissed, on the authority of *Usner* v. *Luckenbach Overseas, et al.,* 400 U.S. 494 (1971), plaintiff's cause of action for unseaworthiness against the shipowner at the completion of plaintiff's evidence on the issue of liability is in conflict not only with the *Usner* case itself, but with (a) this Court's summary decision in *Zim Israel Navigation Co., Ltd.* v. *Tarabocchia,* 401 U.S. 930 (1971) vacating the judg-

ment of the Court of Appeals for the Second Circuit, 417 F.2d 476 (1969) and remanding the case for reconsideration in light of *Usner*, (b) with the subsequent decision of another panel of the Court of Appeals, 446 F.2d 1375, cert. den. —— U.S. —— #71-755 (February 22, 1972), instructing the District Court to dismiss the complaint and finally (c) the recent summary decision of this Court in *Pacific Coast Shipping Co.* v. *Ryan*, —— U.S. —— #71-602 (January 18, 1972), vacating the judgment of the Court of Appeals for the Ninth Circuit which had found an unsafe method of discharge in an isolated, albeit, intentional, act of a crane operator in discharging a sling load of pipe.

It is the position of petitioners that the Court of Appeals has sanctioned a jury on retrial to determine that the addition, on an isolated occasion, of a ninth bale of wood pulp to a customary eight bale draft of cargo would create an unsafe method of discharge and therefore an unseaworthy condition of the vessel, when in fact, all nine bales were safely freed of the discharging gear, and therefore, whatever unsafe method of discharge may have existed had concluded without anything happening before the time of the accident.

Further the Court of Appeals has sanctioned a jury on retrial to determine that an inevitable or at least foreseeable consequence of the hooks ending up on the surface of the pier, a not unusual occurrence as will be seen, would be that the longshoremen would drag or swing them along or near the surface of the pier on the return to the vessel (and therefore be negligent), rather than lifting them directly up until they were free of all obstacles on the pier (and therefore be careful).

By its decision therefore the Court of Appeals has extended to a jury the opportunity on retrial to make a

finding of unseaworthiness inconsistent with the *Usner* decision.

A. *The addition of a ninth bale on an isolated occasion doth not a "method" make.*

Plaintiff testified that this was the only occasion on that day when more than eight bales came out (Tr. 86). Bartnicki stated (Tr. 24) that a ninth bale might be added every fifty or sixty lifts "when you have a broken bale" and therefore hooks could not be used. This would not seem to fit the ordinary definition of a method[10] nor, apparently this Court's interpretation of its own language in *Usner* as to method of discharge. Thus, in *Pacific Coast Shipping Co.* v. *Ryan*, —— U.S. —— #71-602 (January 18, 1972), this Court vacated for further consideration the judgment of the Ninth Circuit 448 F.2d 525 (1971) which found that a crane operator's planned and intentional act of straightening a load of steel pipe against the side of a gondola car constituted an unsafe method of unloading cargo for which the vessel owner could be held liable for an unseaworthy condition.

In the *Pacific Coast* case, the crane operator's act may be said to have at least caused the longshoreman's injury.

---

[10] See Vol. III Webster's New International Dictionary, Second Edition 1959.

METHOD 1. An orderly procedure or process, as orig., of treating disease; regular way or manner of doing anything; hence, a set form of procedure adopted in investigation or instruction; as, a method of improving the mind.
2. Connected arrangement in literary composition; also the art of such arrangement or the discipline teaching it.
3. Orderly arrangement, elucidation, development, or classification; lucid exhibition, as of ideas, systematic arrangement peculiar to a person or a given matter; plan or design; as of an author; more generally, orderliness and regularity or habitual practice of them in action.

Here, however, only a "for-want-of-a-nail-the-shoe-was-lost," etc.[11] type of argument would support the contention that the addition of the ninth bale had anything to do with the subsequent dragging of the hooks across the deck after the bales were discharged. All of which leads petitioners to their next point.

B. *The irrelevance of what was discharged from the hooks prior to their return to the vessel.*

There was utterly no evidence at trial that the addition of a ninth bale in a rope[12] sling weighted down the draft, fell out of the sling, struck plaintiff or someone else, or that anything untoward happened on its journey from the vessel to the dock. Further, it is undisputed that all the bales were freed without incident. The lowering or discharging cycle had therefore ended, the winches were in repose while plaintiff gathered the hooks together. The hoisting of the empty slings awaited a signal from plaintiff. So unsafe was this procedure that nothing whatsoever had happened.

Nor, despite the reluctance of the Court of Appeals to rule it out (p. 4a—footnote 4), did the appropriate regulation[13] forbid the addition of a ninth bale. The regulation does not specify how many bales may be discharged at a given time nor does it disapprove of the use of rope

---

[11] *Theodorics, etc.* v. *Hercules Navigation Co., Inc.*, 448 F.2d 701, 704 (Footnote 8) (5 Cir. 1971).

[12] Bartnicki Tr. 15-16.

[13] 29 CFR Section 1504.81(e):

"Bales of cotton, wool, cork, wood pulp, gunny bags or other similar articles shall not be hoisted into or out of the vessel by their straps unless their straps are of sufficient strength to support the weight of the bale, and two hooks, each in a separate strap, are used."

slings in discharging bales. It is manifestly addressed to the hook and strap technique of discharging and provides that this method may be utilized under given conditions. Where you have a broken bale as described by Bartnicki, this procedure can no longer be followed so that in this instance the longshoreman acted properly in discharging the ninth bale by means of a rope sling, instead of hooks.

It would appear then to be of little consequence whether eight bales, nine bales, thirty bales, no bales, or two each of all the animals on earth were discharged from the vessel so long as the hooks ended up resting on the surface of the pier, as we must assume they were, although how this actually occurred is less than self explanatory since the bale in the rope sling extended below the bales on the hooks and therefore touched the pier first (Siderewicz, Tr. 89). Thus if the rope sling holding the ninth bale were removed from the vessel's cargo hook before the bale hooks were taken off the other eight bales, the situation would have been identical to that of every other eight bale draft.

The real thrust of plaintiff's argument and the Court of Appeals' decision then would have to be that hooks lying on the surface of the pier represented an unseaworthy condition. Nothing however could be less threatening than a pile of hooks quiescent on the pier, nor was this an extraordinary happenstance as plaintiff said (Tr. 90):

> "Q. Are there occasions when the hooks get on the dock? A. I would say yes."

While admittedly the ninth or extra bale argument sounds more menacing than calling immobile hooks on the pier an unseaworthy condition, how superficial this argument is, becomes more evident were we to surmise that at

this moment the lunch whistle sounded and the attempt to return the hooks safely to the vessel was not undertaken until an hour later.

There was therefore no unbroken chain of events between the claimed "unsafe method of discharge", which had ended, if indeed it had ever existed, and the subsequent intervening, dragging of the hooks. The danger to plaintiff lay not in the discharge of nine bales but in the improper return of the hooks to the vessel.

C. It was not inevitable or even foreseeable that in returning the hooks to the vessel, the longshoremen would drag them along the surface of the dock.

Only if the placing of the hooks on the surface of the pier made it inevitable or even foreseeable, that they would thereafter be dragged can it be maintained that this was a proximate cause of plaintiff's accident. It should be evident however, that the later dragging of the hooks was not an irreversible course of conduct imposed upon the longshoremen by the addition of a ninth bale to the draft.

We have seen that plaintiff gathered the hooks together into a "little pile" (Tr. 66) that the drafts had been lowered "down straight". (Siderewicz, Tr. 90), that therefore they could have been taken straight up, that there were other occasions when the hooks got on the dock (Siderewicz, Tr. 90), that the winches, hooks and all other gear were in good operating order, that it was plaintiff's "job" to see that the hooks were "off the pier" (Bartnicki, Tr. 26) and that the signalman was under the impression that "the hooks were clear to my satisfaction" (Tr. 53). The winchman knew the self evident fact that when hooks are dragged

on the dock they may catch (Tr. 109). What was on the hooks prior to being removed cannot, under the circumstances, be employed as an excuse for the subsequent dragging.

It should be axiomatic that longshoremen should not drag empty hooks along the surface of the pier, anymore than they should drag cargo along the surface of the pier. A dragged hook is a carelessly handled hook, and being what it is, a carelessly handled hook may just as well catch upon the ship's rail, strike the signalman standing on the deck of the vessel, snag on the hatch coming on the way into the hold, pull a rung off a ladder leading into the vessel's hold, or cause mischief in other innumerable ways, all of which are attributable to the actions of those to whose direction and control the otherwise inert hooks are entrusted.

While the District Court found it unnecessary to pinpoint which or how many of the three participants were individually negligent, it is of course, possible that plaintiff did not gather all the hooks together, that the signalman did not make sure that they were clear and should have directed the winchman to lift more before pulling in, that he did not stop the winchman after the hook became caught, that the winchman actuated the wrong winch, and instead of lifting, pulled in, or indeed as he stated in Exhibit A (Tr. 43), continued to supply power after the hooks became snagged and without a signal from anyone.

Indeed if it were so unsafe here to have the hooks come down two or three feet lower than normal, instead of returning them to the vessel in one continuous lifting motion, the longshoremen, in an excess of caution, could have raised them two or three feet, with an intervening pause

before resumption of their journey back into the ship's hold. The hooks would then have been in the same position as with an eight bale draft, which no one criticized.

Confronted therefore with a not unfamiliar[14] or complicated situation, and with the means and ability of[15] lifting the hooks so as to free them of all obstructions, the experienced longshoremen involved in the operation, that is plaintiff on the pier, the signalman on the rail of the ship and the winchman actuating the hoisting mechanism, failed to fulfill their acknowledged task—the routine stevedoring function of clearing a set of hooks safely back to the vessel.

All the foregoing only points up that what could only have caused plaintiff's accident was some miscalculation or lack of coordination by or between one or more of the three participants engaged in returning the hooks to the vessel, an isolated momentary[16] act of negligence, exactly the thrust of Judge Lumbard's ruling in the District Court, bowing as he said under *Usner* "to the superior mandate of the Supreme Court of the United States" (p. 17a).

D. *The Court of Appeals opinion conflicts with this Court's decision in* Usner v. Luckenbach Overseas Corporation, *400 U.S. 494.*

This Court sustained summary judgment for the shipowner in *Usner* as the result of careless handling of a sling load of cargo under the control of the winchman. Similarly here empty slings were carelessly handled by longshoremen so as to cause one of the hooks to be fouled on

---

[14] The hooks were stevedore gear (Bartnicki Tr. 26).

[15] Inexplicably the Court of Appeals seems to have given no consideration to the available and fully functional facilities for lifting the hooks without dragging them.

[16] It happened very quickly (Bartnicki Tr. 16, Siderewicz, Tr. 66).

the caplog. Sufficient pressure was continued to tear a piece of the log loose and cause the hook to strike and injure plaintiff.

In *Usner* an empty sling was being lowered to a barge alongside the vessel where plaintiff was engaged in attaching bundles of cargo to the slings. He signaled the "flagman" on deck to direct the winch operator to lower the fall (p. 495).

> "The winch operator then lowered the fall, but he lowered it too far and too fast. The slings struck the petitioner, knocking him to the deck of the barge and causing his injuries."

In neither case was there any difficulty with the winch, falls, slings, cargo or any other equipment or appurtenance before or after the accident.

In *Usner* it was a question of lowering the slings "too far and too fast." Here the sling was dragged along or swung just above the surface of the pier and was kept too low for too long. As in *Usner* it was agreed here that all this happened very suddenly. Bartnicki (Tr. 16), Siderewicz (Tr. 66). Can it be said that there is a difference in substance between what happened in *Usner*, where summary judgment was upheld and here, where the District Court, expressly obeying the mandate of *Usner*, dismissed the action at the close of plaintiff's liability case?

If not, we have the anomolous situation where longshoreman, Joseph Usner is out of Court and longshoreman Robert Siderewicz is back in, endowed by the Court of Appeals with a cause of action for unseaworthiness when injured as a result of his own action or that of his fellow longshoremen in snagging a hook on the pier's caplog.

E. *The Court of Appeals decision conflicts with this Court's summary action in* Zim Israel Navigation Co. v. Tarabocchia, *401 U.S. 930 and with the consequent disposition by another panel of the same Court of Appeals, 446 F.2d 1375.*

Tarabocchia followed *Usner* into this Court. Certiorari was granted following the decision in *Usner*, the judgment in favor of *Tarabocchia* was vacated and the case remanded to the Court of Appeals for further consideration. On review the Court of Appeals found the circumstances within *Usner* and remanded to the District Court with instructions to dismiss the complaint. A further petition for a writ of certiorari was denied by this Court on February 22, 1972 —— U.S. —— (#71-755).

What happened in *Tarabocchia* is best seen from the original District Court opinion, 297 F. Supp. 378. The circumstances are remarkably alike. In each a discharging operation was underway. Plaintiff there was standing on a skid attached to the pier loft opening. Drafts of plywood were being discharged. Slings with loops at each end were employed. They were detached by plaintiff and his coworkers, just as the hooks were detached here. One of the loops was dropped or came to rest on the floor of the skid. Here plaintiff had gathered together the hooks which were resting on the floor of the pier. One of the loops in *Tarabocchia* fell into a crack in the pier and became snarled between the skid and the pier. With the application of power the skid was dislodged, plummeting plaintiff some 20 feet to the concrete stringpiece below. Here the hook was caught on the caplog on the pier edge. As power continued to be applied, the hook and part of the caplog came loose striking and injuring plaintiff.

Tarabocchia being post *Candiano* v. *Moore-McCormack Lines, Inc.* v. *John W. McGrath Corporation*,[17] 382 F.2d 961 (2 Cir. 1967) and pre *Usner*, the trial court concluded 297 F. Supp. 378, 383 that the vessel was unseaworthy "in the improper manner in which the cargo slings were handled by McGrath employees." It was found unnecessary to determine whether plaintiff's fellow longshoreman on the skid or the winchman was negligent,

> "It is clear that if neither Morin nor the winchman acted negligently, this accident would not have occurred. The court finds these negligent acts rendering the cargo slings to be unseaworthy, were the proximate cause of the accident."

Post *Usner* the District Court herein concluded that an isolated act of longshoreman negligence caused the accident and similarly deemed it unnecessary to say whose individual act it was, finding no "condition" which would permit a jury finding of unseaworthiness (p. 17a).

It might be noted that the Court of Appeals in *Tarabocchia II*[18] did not send the case back for retrial to determine whether or not the method employed of freeing the loops prior to their return to the vessel constituted unseaworthiness.[19] Nor did the Court of Appeals remand the case to determine whether unseaworthiness might be

---

[17] The lead case in the series of Second Circuit cases conflicting with Fifth Circuit opinions and the acknowledged basis for granting certiorari in *Usner* (see 400 U.S. 494, 496, footnote 2).

[18] 446 F.2d 1375.

[19] 297 F. Supp. 378, 380 "Although there was testimony to the effect that sliding the entire sling out from underneath the draft, without removing either loop, is the preferred procedure, this method was not employed."

found if one of the loops were lying on or under the skid, as the hooks here were on the pier before the upward thrust of the winch. Instead the Court adhered to its previous holding that what happened in *Tarabocchia* resulted from a "negligent act of a stevedore's employee" 446 F.2d 1375, 1376. This Court denied certiorari on February 22, 1972 (#71-755), although the petition raised (see p. 11) the very point that the loop caught on the skid represented an unseaworthy condition.

Once again the question suggests itself as to what difference in substance, legal or factual, there is between fouling the loop of a sling in an opening in the skid and pulling the skid free, and the dragging of hooks along the pier until one snagged on the caplog, part of which was then pulled free? Nonetheless, at least at the moment, Mario Tarabocchia is out of Court and relegated to his remedies under the New York State Workman's Compensation Law and Robert Siderewicz is back in Court with a jury authorized to find an unseaworthy condition on indistinguishable facts.

While this Court may have believed it had settled the issue in *Usner*, following the decision below, we may well have reverted to where we were when Judge Kaufman stated in his dissenting opinion in *Radovich* v. *Cunard Steamship Co., Ltd.*, 364 F.2d 149, 154 (2 Cir. 1966):

> "* * * I have great difficulty imagining any act of 'operational' negligence which cannot by clever advocacy and hair-line distinctions render the shipowner liable for unseaworthiness."

F. *The holding of the Court of Appeals below is detrimental to uniformity of decision in maritime law.*

Conflicting with this Court's decision in *Usner* and following decisions in *Zim Israel Navigation Co., Ltd.* v. *Tarabocchia,* 401 U.S. 930 and *Pacific Coast Shipping Co.* v. *Ryan,* —— U.S. ——, #71-602, the strained and unsettling opinion of the Court of Appeals is contra-productive to the effort made by this Court to re-establish some predictability and symmetry in what has been, to say the least, a confusing and disturbing area of maritime law. The decision below, petitioner submits, runs against the reemphasis on the uniformity concept, so recently championed by this Court in the historic decision of *Moragne* v. *States Marine Lines, Inc.,* 398 U.S. 375 (1970).

It is perhaps ironic that the decision below came from the same Court of Appeals which, while formally on the opposite side of the *Usner* issue from the Fifth Circuit, actually forced the conflict in Circuits to obtain eventual review by this Court. A number of members of the Court have expressed themselves rather vehemently on the "operating negligence" equal "unseaworthiness" proposition. See for example Chief Judge Friendly's dissent in *Skibinski* v. *Waterman Steamship Corporation,* 360 F.2d 539, 543 (1966), Judge Kaufman's dissent in *Radovich* v. *Cunard Steamship Co.,* 364 F.2d 149, 153 (1966), Judge Moore in *Candiano* v. *Moore McCormack Lines* v. *John W. McGrath Corporation,* 386 F.2d 444, 446, 449 (1967) and again Judge Moore in the first *Tarabocchia* opinion, 417 F.2d 476, 478 (1969), wherein he said:

> "To hold a negligent act of an employee of the stevedore can instantaneously turn a proud seaworthy ship into

> an unseaworthy floating object—may seem to defy common sense but 'unseaworthiness' may have become a term wholly unrelated to reality."

Indeed in *Candiano, supra,* p. 446 Judge Moore said that:

> "There should be some uniformity of rule—not only in the interest of justice but also of fairly reasonable consistency."

He then went on to praise (p. 448) this Court's *Mitchell* v. *Trawler Racer,* 362 U.S. 539, 550, distinction between unseaworthiness and negligence for its "clarity". Curiously, it was this very distinction between negligence and unseaworthiness which this Court later recalled in *Usner* (400 U.S. 494, 500) that it had "so painstakingly and repeatedly emphasized in our decisions."

Maintenance of the Court of Appeals decision will, petitioners submit, introduce a discordant note to the harmony of this Court's efforts to settle the operating negligence issue, as evidenced by its decisions in *Usner, Tarabocchia* and *Pacific Coast Shipping Co.* v. *Ryan.* What was said by this Court in the recent *Victory Carriers, Inc. et al.* v. *Law,* 404 U.S. 202 (1971) decision is also applicable to Messrs. Tarabocchia, Ryan and Siderewicz:

> "What is at issue is the *amount* of the recovery, not against a shipowner, but against the stevedore employer. As this case illustrates, the shipowner's liability for unseaworthiness would merely be shifted, with attendant transaction costs, to the stevedore by way of a third party action for indemnity. *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Steamship Corp.,* 350 U.S.

124 (1956). The State's own arrangements for compensating industrial accidents would be effectively circumvented."

Circuit Judge Moore declared in *Tarabocchia* v. *Zim Israel Navigation Co. Ltd.* v. *John W. McGrath Corporation,* 417 F.2d 476, 478 (1969):

"We have thus crossed our Rubicon and if we are to retreat from our position, it must be over a bridge constructed by the Supreme Court when, as and if it may choose to resolve the apparent conflict between the Circuits."

This Court built the requested bridge in *Usner.* It strengthened and reinforced it in *Tarabocchia* and *Pacific Coast Shipping Co.* v. *Ryan.* The Court of Appeals, has begun to dismantle it in *Siderewicz.*

The decision below, in petitioners' judgment, calls for intervention by this Court at this stage and not after a jury trial on an erroneous interpretation of *Usner,* an additional hearing in the Court of Appeals and eventual petition to this Court.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari herein be granted.

Dated: May 1, 1972.

Respectfully submitted,

FRANCIS X. BYRN
One States Street Plaza
New York, N. Y. 10004
Counsel for Petitioners
Enso-Gutzeit O/Y and
Finn Lines, Ltd. O/Y

JOHN J. COTTER, Esq.
1167 Park Avenue
Bridgeport, Connecticut 06604
Counsel for Petitioner
Connecticut Terminal Co., Inc.

HAIGHT, GARDNER, POOR & HAVENS
Of Counsel to Petitioners
Enso-Gutzeit O/Y and
Finn Lines, Ltd. O/Y

COTTER, COTTER & SOHON
Of Counsel to Petitioner
Connecticut Terminal Co., Inc.

APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 230—September Term, 1971.

(Argued November 9, 1971 Decided January 4, 1972.)

Docket No. 71-1705

ROBERT SIDEREWICZ,

Plaintiff-Appellant,

—v.—

EXSO-GUTZEIT O/Y, FINN LINES, LTD., O/Y, and BOISE-GRIFFIN STEAMSHIP CO., INC.,

Defendants and Third-Party Plaintiffs-Appellees,

—v.—

CONNECTICUT TERMINAL CO., INC.,

Third-Party Defendant-Appellee.

Before:

FRIENDLY, *Chief Judge,*
FEINBERG, *Circuit Judge,* and DAVIS, *Judge.**

Appeal from an order of the District Court for District of Connecticut, J. Edward Lumbard, *Circuit Judge*, sitting

* Of the United States Court of Claims, sitting by designation.

by designation, dismissing before submission to the jury, for failure to establish a cause of action, a complaint seeking recovery by a longshoreman from the shipowner for personal injuries.

Reversed.

JACOB RASSNER, New York, N. Y. (Alan C. Rassner, of counsel), *for Plaintiff-Appellant.*

FRANCIS X. BYRN, Stratford, Conn. (Haight, Gardner, Poor & Havens, New York, N. Y., and Robert K. Marzik, Stratford, Conn., of counsel), *for Defendants and Third Party Plaintiffs-Appellees.*

JOHN J. COTTER, Bridgeport, Conn., *for Third Party Defendant-Appellee.*

DAVIS, *Judge*:

As the case comes to this court, it involves a longshoreman's claim against the shipowner for injury through the alleged unseaworthiness of a vessel which he was helping to unload.[1] Plaintiff Robert Siderewicz, a stevedore employed by Connecticut Terminal Co., Inc., was part of a gang discharging a cargo of wood pulp at the State Pier, New London, Connecticut in December 1965, from M/S Finneagle, a Finnish vessel owned by defendants Enso-Gutzeit O/Y and Finn Lines, Ltd. Stationed on the pier, he was hurt when one of the hooks, after being freed of

[1] Plaintiff's additional claim of negligence was dismissed by consent after the close of all the evidence. Also by consent, Boise-Griffin Steamship Co., Inc., the shipowner's agent in the United States, was dismissed as a defendant.

bales in the unloading process, snagged on part of the pier as the empty sling to which it was attached was being returned to the vessel. His contention is that the hook caught on the pier because of the improper method of unloading. The owners resisted this claim and impleaded plaintiff's employer, Connecticut Terminal, for indemnity if Siderewicz should prevail. At the close of all the evidence in a jury trial, the District Court granted a motion to dismiss the complaint on the ground that the elements of a viable claim had not been established and there was unsufficient evidence to go to the jury.[2]

The first issue is whether a *prima facie* case was made that the technique of unloading was improper. If so, a jury question of unseaworthiness has been presented; the Supreme Court reiterated in *Usner* v. *Luckenbach Overseas Corp.*, 400 U.S. 494, 499 (1971), that a ship's unseaworthy condition could arise from an improper method of loading her cargo, and an improper method of unloading falls into the same class. *Gutierrez* v. *Waterman S.S. Co.*, 373 U.S. 206, 211-15 (1963); *A. & G. Stevedores* v. *Ellerman Lines*, 369 U.S. 355 (1962).[3] The general procedure here was to discharge from the ship (by use of a winch and slings) eight bales at a time, each with two hooks, but there was testimony that the particular draft unloaded to the pier

---

[2] Previously, another judge had denied plaintiff's motion for summary judgment, saying "genuine issues as to material facts are present, including the defendants' claim that plaintiff's negligence was the sole or a contributory cause of the accident."

[3] The recent decision in *Victory Carriers, Inc.* v. *Law*, U.S. Sup. Ct., Oct. Term 1971, No. 70-54, 40 L.W. 4059 (decided Dec. 13, 1971) does not affect the present case. That was a "pier-side accident[s] caused by a stevedore's pier-based equipment" (40 L.W. 4060); here, the harm was caused by unloading gear operating from the ship, a type of injury which the opinion in *Victory Carriers* distinguished (see 40 L.W. 4062, 4063).

just before the accident contained an extra ninth bale tied by rope (without hooks) to the other eight. Plaintiff argues that the addition of the ninth bale made the process unsafe, and thus unseaworthy, because to discharge such an overloaded sling required it to be brought closer to the floor of the pier with the likely result that the hooks would drag on or near the floor after unloading, and more easily tend to get snagged on the planks or on the caplog at the edge of the dock.

Plaintiff's proof on this point is not uncontroverted, but there was clearly enough to go to the jury. One witness testified that "two hooks have always been the rule," that it is customary to hook each bale, and that it is not usual for the hooks to drag when there are only eight bales. Another testified that eight bales is the "standard procedure," that "[w]hen the draft is landing with the nine [bales], you have problems with the hooks" "[b]ecause the hook that contains the lifting apparatus has to be dropped lower to take the rope sling off * * *," and that when hooks drag along the dock that is a competent producing cause for the hooks catching. Plaintiff's own evidence was that the custom and usage was to use eight bales with two hooks to the bale; that it is a dangerous practice to use nine bales; and that if you do use nine bales "[y]ou have to lower the cargo hooks down around two more feet * * *" or "from 2 to 3 feet more than you normally do."[4] This testimony, if believed, was enough to ground

[4] In addition, plaintiff relied on a portion of the Safety and Health Regulations for Longshoring (29 CFR §1504.81(e), formerly 29 CFR §9.81) providing: "Bales of cotton, wool, cork, wood pulp, gunny bags or other similar articles shall not be hoisted into or out of the vessel by their straps unless the straps are of sufficient strength to support the weight of the bale, and two hooks, each in a separate strap, are used." Since there was enough live testimony

a verdict that the addition of the ninth bale made the whole procedure unsafe.[5]

The next, and critical, question is whether, assuming that the method of unloading was improper, there was an adequate showing that this technique proximately caused the accident. As we understand his view, Judge Lumbard, sitting in the District Court, thought that the answer had to be negative because the evidence showed that (a) plaintiff had gathered all the hooks up off the dock into his arms—so that they were no longer dragging on or near the pier—before the occurrence of the snagging which led to the injury, and (b) the snagging came about because of the negligence of another stevedore (the signalman or the winchman), or possibly of appellant himself. As to the latter proposition, *Usner* v. *Luckenbach Overseas Corp.*, *supra*, holds that an isolated, personal, unforeseeable act of negligence by a fellow longshoreman does not make the shipowner liable on the ground of unseaworthiness, if the condition of the ship, her appurtenances, her cargo and her crew were all satisfactory. See *Tarabocchia* v. *Zim Israel Navigation Co.*, 446 F.2d 1375 (2d Cir. 1971).

There was, indeed, testimony supporting that cast of the facts, but there were also statements (in part by the same witnesses) which could mean that the hooks had not yet

---

to take to the jury the issue of improper unloading technique, we do not now decide the bearing of this regulation or whether it would, if relevant, be enough by itself to show unseaworthiness.

[5] If putting nine bales in the draft made the vessel unseaworthy, the shipowner would not be saved from liability because it may have been negligent of the stevedoring company to use that technique. *Grillea* v. *United States*, 232 F.2d 919, 922-23 (2d Cir. 1956); *Thompson* v. *Calmar S.S. Corp.*, 331 F.2d 657, 659 (3rd Cir. 1964); see *Crumady* v. *The Joachim Hendrik Fisser*, 358 U.S. 423, 427-28 (1959).

been gathered up off the pier but were still dragging on, or almost touching, the floor, even though held together by plaintiff.[6] On this evidence the jury could decide that the improper condition of unloading proximately caused the accident because the hooks were at all pertinent times closer to the dock floor than they would have been under the correct technique, and thus more likely to be caught on the planks or on the caplog at the edge of the dock. The appellant's evidence on this score was certainly not overwhelming but we think it enough, if accepted, to sustain a favorable verdict.

On both of these issues, unseaworthiness and proximate causation, the jury could reasonably find either way, and a direction for defendants could not properly be made. See *Baker* v. *Texas & Pacific Ry. Co.*, 359 U.S. 227, 228-29 (1959); *Brady* v. *Southern Ry. Co.*, 320 U.S. 476, 479-80 (1943); *Berke* v. *Lehigh Marine Disposal Corp.*, 435 F.2d 1073, 1075 (2d Cir. 1970); *Armstrong* v. *Commerce Tankers Corp.*, 423 F.2d 957, 959 (2d Cir. 1970); *Julian J. Studley Inc.* v. *Gulf Oil Corp.*, 407 F.2d 521 (2d Cir. 1969). Accordingly, the case must be retried.[7]

Reversed.

---

[6] We refer to the evidence of Bartnicki at App. 16-18 and 41 and plaintiff at App. 77-78 which can be understood as saying that in that specific instance the hooks were still dragging or close to the pier. The apparently conflicting testimony on which appellees rely can possibly be read as referring to a general practice of a longshoreman's gathering the hooks up in his arms before they are returned to the vessel, rather than to the actual and precise events at the time of this accident.

[7] Plaintiff also contends that the dock area was unsafe, and by the same token the vessel unseaworthy, because the dock failed to have a plywood cover or some other device to prevent the snagging of hooks. Appellees answer that this question was not properly raised in the trial court, and in any event the shipowner does not warrant the seaworthiness of the pier (see fn. 3, *supra*). Since we order a new trial on other grounds, we leave this matter open, without passing upon either of defendant's points.

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the Fourth day of January one thousand nine hundred and seventy-two.

Present:

HON. HENRY J. FRIENDLY,

Chief Judge,

HON. WILFRED FEINBERG,

Circuit Judge,

HON. OSCAR H. DAVIS,

Court of Claims.

ROBERT SIDEREWICZ,

Plaintiff-Appellant,

—v.—

ENSO-GUTZEIT O/Y FINN LINES, LTD., O/Y and BOISE-GRIFFIN STEAMSHIP CO., INC.,

Defendants and Third-Party Plaintiffs-Appellees,

—v.—

CONNECTICUT TERMINAL CO., INC.,

Third-Party Defendant-Appellee.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for further proceedings in accordance with the opinion of this Court with costs to be taxed against the appellees.

A. DANIEL FUSARO
Clerk

Order Denying Rehearing by Court of Appeals

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

71-1705

ROBERT SIDEREWICZ,

Plaintiff-Appellant,

—v.—

ENSO-GUTZEIT O/Y FINN LINES, LTD., O/Y and BOISE-GRIFFIN STEAMSHIP CO., INC.,

Defendants and Third-Party Plaintiffs-Appellees,

—v.—

CONNECTICUT TERMINAL CO., INC.,

Third-Party Defendant-Appellee.

A petition for a rehearing having been filed herein by counsel for the appellees,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

HENRY J. FRIENDLY
Chief Judge

WILFRED FEINBERG
Circuit Judge

OSCAR H. DAVIS
Associate Judge
U.S. Court of Claims.

February 8, 1972.

Order Denying Rehearing in Banc by Court of Appeals

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

71-1705

ROBERT SIDEREWICZ,

Plaintiff-Appellant,

—v.—

ESSO-GUTZEIT O/Y FINN LINES, LTD., O/Y and BOISE-GRIFFIN STEAMSHIP CO., INC.,

Defendants and Third-Party Plaintiffs-Appellees,

—v.—

CONNECTICUT TERMINAL CO., INC.,

Third-Party Defendant-Appellee.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellees and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

WILFRED FEINBERG
Acting Chief Judge

February 8, 1972.

Post Trial Colloquy in the District Court

[110] The Court: Yes, for all these reasons we will excuse the jury now until tomorrow morning.

Mr. Rassner: And may this witnes be excused?

The Court: Yes.

(Witness excused.)

The Court: Ladies and gentlemen, we will ask you to return tomorrow morning in time to start at 9:30 you have in mind the previous admonition of not discussing this case with anybody. Keep an open mind until you have heard the evidence.

We will excuse you now.

(Whereupon the jury was excused.)

Mr. Byrn: On behalf of the two Finnish operation, the shipowner in this litigation, I would like at this time to move to dismiss the negligence claim. There is absolutely no evidence of any involvement of ship's personnel, and no notice of any condition to ship's personnel, and no indication of any control exercised by ship's personnel over this operation.

The Court: Do you take a position on that, Mr. Rassner?

Mr. Rassner: I agree with Mr. Byrn. I have no objection to the granting of that motion.

Mr. Byrn: Secondly, your Honor, it would [111] appear to the defendant that the action controlled by the Supreme Court's decision, 400 US 494, decided on January 25, 1971 and it seems this accident was approximately caused by a

combination of the negligence of either the plaintiff on the pier who grabs the hooks and didn't make sure they were free of the pier or the signalman who didn't coordinate it or the winchman himself who didn't respond to the signalman. In any event, employees of Connecticut Terminal. And one or more may have participated in a single isolated act of negligence which caused this accident and the complicating factor of the extra rope sling but I would maintain that whether it was there or not—

The Court: What are you arguing now? I thought we had agreed that the negligence will be dismissed.

Mr. Byrn: The seaworthiness issue, your Honor.

The Court: You're speaking in terms of negligence and I was afraid I could not follow you.

Mr. Byrn: No, your Honor, the 400 US 494 Case had to do with whether or not operating negligence of employees to make a vessel unseaworthy.

The Court: Operating negligence of whose [112] employees?

Mr. Byrn: The stevedore's employees can make a vessel unseaworthy and we maintain that it was caused by operating negligence and under the Usner Case the action should be dismissed.

I started to mention there was the complicating factor of whether the extra rope sling had something to do with this or not and we maintain that it had no proximate cause as far as the accident was concerned and the proximate cause of the accident, the activity of the plaintiff himself, the signalman or the winchman, any or all of them but whatever it was, it had nothing to do with how the slings were made up. They were all freed of the cargo and then taken up.

The Court: I am not sure whether there is any evidence on the point of the slings being made up by the stevedore in the hole.

Mr. Byrn: There is evidence and the plaintiff testified to that as did Mr. Bartnicki and that would be the substance of our motion, your Honor.

Mr. Cotter: May I point out a few things, your Honor. I made specific effort in trying to point out that this was the only time this particular item happened all day long. I asked him whether or [113] not it had happened on any other occasion. I was following the decision in the Supreme Court also and that was a sling case knocking a stevedore over who was on a barge and in that case it had been held that in the lower court that the winchman allowed the sling to come down too fast or slow and the Supreme Court held in that case, which is almost identical as this case, that one isolated act of negligence where he let the sling come down too far, as in this case, where that one particular bale was put on that and it was nine instead of eight and done once. Under those circumstances the Supreme Court held, and I think it was Justice Stewart, that one isolated act of negligence does not make a ship unseaworthy. Of course, if it is not found to be unseaworthy there can be no action by the stevedore against this ship.

I think that the court went on to show that one of the questions that are brought out was at no time before or after this particular single act of negligence was there any problem with any of the gear or the ship's crew or its appurtenances. I asked the plaintiff specifically, and everyone else, if they had any trouble with the winch and the hooks and I went down the list of anything that was [114]

involved in this case. I think, if your Honor will read this particular case, it is almost on all fours with the problem that we have here. It says here a vechicle condition of seaworthiness must arise from a number of circumstances. Gear may be defective here, crew and number of men. I took each of those items and asked this man if there was anything under that. The court held that it was not the condition of the ship but the negligent act of the petitioner, the fellow longshoreman. In this particular case the same thing has happened. Either the one on the winch brought it up too fast or the longshoreman, the signalman, didn't signal or it was because of the nine bales that were put on and all the men, some employees of the plaintiff, and this is the exception. This is why although the plaintiff has selected under Workman's Compensation in the state that the Supreme Court makes this exception and the exception under the facts, and the facts are not disputed, bring us solely within this case. To put this ship and stevedore company to an exposure of a verdict before a jury that does not understand it, it will require appeals and so forth. I think the facts are so clear to your Honor that you should take the occasion to dismiss [115] this particular matter.

The Court: Mr. Rassner, what do you have to say?

Mr. Rassner: I am relying on the Usner Case, 400 US 494, basically and particularly the method of loading a cargo or the manner of its stowage might be improper and that is considered unseaworthy.

The Court: It was entirely the stevedore's job and nobody representing the ship owner was in sight.

Mr. Rassner: The method of having nine bales instead of the usual number of eight.

The Court: Who is to blame for that? Not the shipowner.

Mr. Rassner: The shipowner is held liable for the unworkmanlike manner of discharging the vessel as I read the case and all the cases.

The Court: If that is what it gets down to, I guess I better read this case right now.

Mr. Rassner: As a matter of fact, this is the case I am relying on.

The Court: I hope it comes as not too much of a surprise to you but I have difficulty in understanding that.

Mr. Rassner: It does come as a surprise to [116] me. I made my position clear in my brief and then I'm relying on it and particularly footnote 17 and that the method of discharging constitutes unseaworthiness—the method of discharge by the stevedores constitutes unseaworthiness of the vessel. I have a number of other cases and some by our Circuit Court of Appeals.

I have set them forth in my brief, my pre-trial memo, and I have gone all through them. There is no doubt in my mind.

The Court: What about the three opinions of the Second Circuit and they are cited apparently only to show that there was a conflict.

Will you refresh my recollection as to how the Second Circuit held on this?

Mr. Rassner: I placed them in my memo.

The Court: The Second Circuit is being overruled.

Mr. Rassner: But that is as to one isolated act. There is nothing instantaneous here.

Mr. Cotter: I ask the man how quickly it happened.

The Court: It happened so quickly that the plaintiff couldn't get out of the way although that would be the natural thing to do.

[117] Mr. Rassner: The injury was instantaneous and not the method of loading or discharging or putting on nine bales instead of eight or the method of lifting without cargo hooks, without a rope and none of that was instantaneous. Of course an injury is instantaneous but we are talking about the method and that was unseaworthy.

The Court: It says at the top of the right hand column that what caused the petitioner's injuries in the present case was not the condition of the ship or appurtenances or cargo or the crew but the isolated personal negligence act of the petitioner's longshoreman.

Mr. Rassner: That is the point. This is the method which brought about this accident.

The Court: Well, when the method works properly, nothing happens and it is when you have an isolated negligence act entirely that of the stevedore.

Mr. Rassner: If the method is bad, then, of course, negligent acts occur and the workmanship is improper and contrary to the established usage and custom. It is a bad method and a dangerous method.

The Court: I don't think I have any choice [118] but to hold it because under this case you have failed to make out a cause of action.

Mr. Rassner: I can't control your Honor's thinking. I can give you my version of the law.

The Court: Maybe the Apparent Court, my colleagues, would be delighted for the opportunity to overrule me.

Mr. Rassner: Would your Honor care to read my brief?

The Court: I don't see what your brief can do with this case. The decision is so square; the principle is clear and the facts similar.

Mr. Rassner: Again, I say and I am referring to what the majority said that the method of loading cargo or the man-

ner of the stowage might be improper and that is unseaworthy. We have proved that.

The Court: Well, I regret the consequences as far as this plaintiff is concerned but I have to bow to the superior mandate of the Supreme Court of the United States.

Mr. Rassner: There is no point in my saying anything more except order the minutes.

The Court: I have not yet read this Usner Case. I was not aware that the Supreme Court has made a turnabout.

[119] Mr. Rassner: I think we are right and I have studied it carefully. I have analyzed the Usner Case.

The Court: Mr. Rassner, no matter how much you study or time you gave to this or how many times I read your brief, I don't know how I can do anything with this decision of the Supreme Court.

Mr. Rassner: Your Honor, read the last paragraph, the method in loading a cargo and the manner of stowage might be considered unseaworthy.

The Court: The method that was used here was a method that had been used as far as the witnesses were concerned for as long as they had done this kind of work until some act of negligence occurs and it is not necessary to say whose act it was.

It might in part be that of the plaintiff although it seems more likely that it was the signalman who supposedly was watching what happened and, perhaps, should have given the signal somewhat sooner but, in any event, whose ever fault it might be and to what degree, the one thing that seems clear is that it is not the condition under this Supreme Court case which permits the jury to find that the ship was unseaworthy.

[120] Mr. Rassner: Your Honor has made his decision. I know what my rights are and it is not to argue with your

Honor on the record. I merely say I have tried to show your Honor our view.

The Court: I appreciate that. You always argue your points well, Mr. Rassner. You are an expert in these cases but neither you nor I can do much when the Supreme Court has clearly indicated the position which we must take in this situation.

Mr. Rassner: All I can say is that I read the decision differently than your Honor reads it. Your Honor may be right. I hope not but your Honor may be right. We will find out later.

The Court: You have your remedy to pursue in the Court of Appeals and I would be very interested to see what my colleagues do with this.

The motion you gentlemen make is to dismiss the complaint?

Mr. Byrn: Yes, your Honor.

Mr. Cotter: Yes, your Honor.

The Court: The motion is granted.

Mr. Rassner: May I have an exception?

Mr. Byrn: Generally it is agreed this was caused by the negligence of the employees of [121] Connecticut Terminal and in view of that I move that the judgment be granted for counsel fees even though the action has been dismissed under the decision of the Court of Appeals. The only thing we have reserved is the quantum.

Mr. Cotter: Frankly I didn't realize we were going to argue that now.

The Court: Let me know in advance when you would like to come late some afternoon or morning or almost any other time at your mutual convenience or you may submit something rather than coming here. And you can agree on the figure.

Mr. Byrn: The only purpose of my moving at this time is to have part of this judgment include the counsel fees. We had reserved the amount of them to a later time by prior stipulation.

The Court: The judgment does not need to be entered for a few days.

Mr. Cotter: No, your Honor.

The Court: I will keep that in mind and you will have the opportunity, before judgement, to argue this question or submit any authorities that you may care to have me consider.

Mr. Byrn: Maybe we can discuss it as well.

The Court: That is all for the afternoon, [122] gentlemen. We will now adjourn until tomorrow morning.

(Whereupon court was adjourned)

Judgment Appealed From

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ROBERT SIDEREWICZ,

Plaintiff,

—against—

ENSO-GUTZEIT O/Y: FINN LINES, LTD., O/Y and BOISE-GRIFFIN STEAMSHIP CO., INC.,

Defendants and Third-Party Plaintiffs,

—against—

CONNECTICUT TERMINAL CO., INC.,

Third-Party Defendant.

The above captioned matter having duly come on for trial before the Court and jury on the 17th day of May, 1971, and the attorneys for all parties having consented to a dismissal of the action as against defendant, Boise-Griffin Steamship Co., Inc., and defendant and third-party plaintiff, by its attorney having moved to dismiss the complaint at the close of plaintiff's case on the issue of liability, and plaintiff by his attorney, having consented to the dismissal of the cause of action based on alleged negligence of defendant and third-party plaintiff and the Court having heard the argument of Francis X. Byrn, Esq. in support of the motion to dismiss the cause of action based on

alleged unseaworthiness of the m/s FINNEAGLE and the argument of John J. Cotter, Esq., attorney for third-party defendant, also in support thereof, and the argument of Jacob Rassner, attorney for plaintiff in opposition thereto, and due deliberation having been had thereon,

Now, on motion of the attorney for defendant and third-party plaintiff it is,

ORDERED, ADJUDGED, and DECREED that plaintiff's complaint be and the same is hereby dismissed with prejudice and with costs to be taxed in favor of defendant and third-party plaintiff as against plaintiff, and it is further,

ORDERED, ADJUDGED and DECREED that defendant and third-party plaintiff have judgment in its favor on its claim for indemnity against third-party defendant and that defendant and third-party plaintiff recover thereon its reasonable counsel fees and expenses incurred in the defense of plaintiff's action.

J. EDWARD LUMBARD
United States Circuit Judge

June 2, 1971